

**John Morrell & Co. and Jimmy W. Smith. Case 26-  
CA-9638**

26 April 1984

**DECISION AND ORDER**

**BY CHAIRMAN DOTSON AND MEMBERS  
ZIMMERMAN AND HUNTER**

On 29 September 1983 Administrative Law Judge Philip P. McLeod issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief, cross-exceptions, and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.

On 7 June 1983 the Respondent filed with the Board a Motion for Summary Judgment requesting that the Board defer to an arbitrator's decision dated 26 February 1982 upholding the discharge of discriminatee Jimmy W. Smith. By order dated 10 June 1983 the Board denied the Respondent's motion without comment. As indicated at fn. 1 in the judge's decision, the Respondent's argument for deferral was not renewed before the judge. The Respondent excepted to the Board's denial of its Motion for Summary Judgment and again requests that the Board defer to the arbitrator's award. We decline to defer to the arbitrator's decision as we find it is not consistent with the standards for deferral set forth in *Spielberg Mfg. Co.*<sup>2</sup>

The 1979-1982 collective-bargaining agreement between the parties contained only a general no-strike/no-lockout clause without additional reference to duties of union officials in such circumstances.<sup>3</sup> On 21 October 1981 an unauthorized

work stoppage occurred at the Respondent's Chelsea Street facility during which acting steward Smith refused to comply with the Respondent's instructions that he direct his coworkers to return to work. Smith was terminated as a result of the work stoppage and his termination was arbitrated. The arbitrator did not interpret the parties' collective-bargaining agreement to find that it imposed an explicit duty on union officials to make efforts to end unlawful work stoppages. Rather the arbitrator relied solely on the published decisions of labor arbitrators to conclude that a union official, by virtue of his status and office alone, has an affirmative duty to "actively and unequivocally attempt to bring an end" to unauthorized work stoppages. The arbitrator found that "Mr. Smith did not discharge his obligation to see to it that the reasonable efforts were made to stop the strike."

We find that the arbitrator's award is clearly repugnant to the purposes and policies of the Act<sup>4</sup> as interpreted by the Supreme Court in its recent decision in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). The Supreme Court held that an employer may impose greater discipline on union officials only when the collective-bargaining agreement or circumstances surrounding the collective-bargaining relationship indicate the union has waived its officials' Section 7 rights by imposing on them a duty to take affirmative steps to end unlawful work stoppages.<sup>5</sup> The collective-bargaining agreement involved in *Metropolitan Edison* contained a general no-strike/no-lockout clause which, like the one in the instant case, did not include any explicit language imposing a higher duty on union officials than on rank-and-file employees. We therefore decline to defer to the arbitrator's award as we find it is not susceptible to any interpretation consistent with the Supreme Court's opinion in *Metropolitan Edison*.<sup>6</sup>

<sup>4</sup> The remaining *Spielberg* criteria are not in issue. No party contends that the parties had not agreed to be bound by arbitration or that the proceedings were not fair and regular.

<sup>5</sup> In *Member Hunter's* view the Supreme Court in *Metropolitan Edison*, supra, clearly held that a waiver may be established by looking beyond the four corners of the parties' collective-bargaining agreement. Thus, an explicit and higher duty on the part of union officials to enforce a no-strike clause may be established by past practice, including an arbitrator's award covering similar facts and interpreting the contract or a pattern of arbitration awards rendered under the parties' contract which do not necessarily address the contract language explicitly, at least where such prior awards are not nullified by the existing agreement as they were in *Metropolitan Edison*. (See *Metropolitan Edison*, supra at fn. 13.) Inasmuch as neither of these conditions are met by the arbitral award here, Member Hunter agrees with his colleagues that deferral is inappropriate.

<sup>6</sup> Compare *Olin Corp.*, 268 NLRB 573 (1984), wherein the Board deferred to an arbitration award which interpreted a collective-bargaining agreement's no-strike clause which contained additional language so as to require that union officers take affirmative actions in the face of unprotected work stoppages. Member Zimmerman dissented from the articulation and application of a new standard for deferral in *Olin*, but he agreed

*Continued*

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> 112 NLRB 1080 (1955).

<sup>3</sup> Art. II, sec. 5 of the contract provided:

Provisions having been made by this Agreement and local agreements for the peaceful and orderly settlement of any disputes which may arise between Company and the Union or local Unions or any Employee or Employees, it is agreed that during the term of this Agreement there shall be no strike, stoppage, slowdown, or suspension of work on the part of the union or any local union or any Union member or lockout on the part of the Company on account of such disputes until after an earnest effort shall be made to settle all such matters in the manner provided in the respective agreements.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, John Morrell & Co., Memphis, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

CHAIRMAN DOTSON, concurring.

I concur in the decision reached by my colleagues. In my view the Supreme Court's recent decision in *Metropolitan Edison Co. v. NLRB*,<sup>1</sup> which we follow here, is contrary to a long line of persuasive arbitral authority permitting precisely the sort of greater steward discipline involved here.

The Board has frequently stressed, most recently in *Olin Corp.*,<sup>2</sup> that national labor policy strongly favors the peaceful settlement of labor-management problems through the voluntary arbitration of disputes. The importance of deferring to the "industrial common law . . . of the industry and the shop"<sup>3</sup> created through the arbitration process cannot be overemphasized. In their many years of creating that "common law of the shop" arbitrators have recognized almost unanimously that stewards and other union officials have a higher duty than rank-and-file employees to adhere to the terms of a collective-bargaining agreement. Specifically, arbitrators have characterized the duty of a union steward to prevent or terminate illegal work stoppages in the following manner:

If there is one principle that is universally recognized in the field of industrial relations, it is that shop stewards have the highest duty to faithfully adhere to all of the provisions of the Collective Bargaining Agreement and to actively instruct each employee to do so as well. While it is improper for an ordinary employee to deliberately breach the Agreement, a similar act by a shop steward is untenable and grounds for his discharge. It is the obligation of the steward to set an example for all Union members within his jurisdiction by demonstrating his loyalty to the terms and conditions of the contract negotiated by his Union with the Employer. . . . Indeed, a shop steward's duty in the face of an unauthorized work stoppage

is well settled. Not only should he make a determined effort to prevent the stoppage before it begins, but upon its development must actively and unequivocally attempt to bring an end of the stoppage at the earliest possible moment.<sup>4</sup>

Historically, arbitrators further recognized the principle that the higher responsibility of union officials justified disciplining them more severely than rank-and-file employees for participating in wildcat strikes.<sup>5</sup> In the words of one eminent arbitrator:

By virtue of his office, further, a Union steward or committeeman is a leader; indeed, it is reasonable to assume that it is because he is a leader that he acquires his Union office. It follows inescapably that when a Union steward or committeeman participates in a work stoppage—making no effort to prevent it or bring it to a close—he is setting an example for the other employees and indicating by his action that the stoppage has his tacit approval and sanction. This is a graver offense than participation by an ordinary employee and justifies a more serious penalty.<sup>6</sup>

The arbitrator's award in this case was fully consistent with the arbitral decisions referred to above. I agree with that award and with the arbitral authority on which it was based and maintain that duties which have been consistently recognized by arbitrators, as those entrusted with the task of interpreting collective-bargaining agreements, should also be recognized by the Board and the courts in their interpretation of the National Labor Relations Act. However, the Supreme Court has chosen to disregard this well-established "common law of the shop" in a decision which will have great impact on the balance previously reached in this area. Were I not bound by the Supreme Court's *Metropolitan Edison* decision, I would not find the arbitrator's award issued in this case to be clearly repugnant to the purposes and policies of the Act.

<sup>4</sup> *United Parcel Service*, 47 LA 1100, 1100-1101 (1966) (Schmertz, Arb.)

<sup>5</sup> See, e.g., *United Parcel Service*, supra; *New Jersey Bell Telephone Co.*, 77 LA 1038, 1041 (1981) (Wolff, Arb.); *Mack Trucks*, 41 LA 1240, 1243 (1964) (Wallen, Arb.), and cases cited therein.

<sup>6</sup> *International Harvester Co.*, 14 LA 986, 988 (1950) (Seward, Arb.). I note that prior to its decisions in *Precision Castings Co.*, 233 NLRB 183 (1977), and *Gould Corp.*, 237 NLRB 881 (1978), enf. denied 612 F.2d 728 (3d Cir. 1979), the Board also recognized that the higher responsibility of union officials justified their more severe discipline for engaging in unprotected activity. See, e.g., *Riviera Mfg. Co.*, 167 NLRB 772 (1967); *University Overland Express*, 129 NLRB 82 (1960); and *Stockham Pipe Fittings Co.*, 84 NLRB 629 (1949).

that deferral there was appropriate for reasons set forth in his separate opinion.

<sup>1</sup> 460 U.S. 693 (1983).

<sup>2</sup> 268 NLRB 573 (1984).

<sup>3</sup> *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 581-582 (1960).

## DECISION

## STATEMENT OF THE CASE

PHILIP P. McLEOD, Administrative Law Judge. This case was heard by me on June 13 and 14, 1983, in Memphis, Tennessee. It originated from a charge filed on April 6, 1982, Jimmy W. Smith, an Individual, herein called J. W. Smith or Smith, against John Morrell & Co., herein called the Respondent.

On May 18, 1982, a complaint and notice of hearing issued alleging, *inter alia*, that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, herein called the Act, by discharging Smith. In its answer to the complaint, the Respondent admitted certain allegations, including the filing and serving of the charge, its status as an employer within the meaning of the Act, the status of various individuals as supervisors and agents of the Respondent within the meaning of the Act, and the status of United Food and Commercial Workers, Local No. 242, as a labor organization within the meaning of Section 2(5) of the Act. The Respondent admitted having discharged Smith on or about October 21, 1981. The Respondent denies that Smith's discharge was in violation of the Act and denied having engaged in any conduct which would constitute an unfair labor practice.

At the trial herein, all parties were represented and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Following the close of the trial, both the Respondent and counsel for the General Counsel filed timely briefs with me which have been duly considered.

On the entire record in this case, and from my observation of the witnesses, I make the following

## FINDINGS OF FACT

## I. JURISDICTION

John Morrell & Co., during all times relevant to this proceeding, was engaged in business in Memphis, Tennessee, in the processing and distributing of beef, pork, and other food products.

In the course and conduct of its business, the Respondent annually sold and shipped from its Memphis, Tennessee facility products, goods, and materials valued in excess of \$50,000 directly to points outside the State of Tennessee. Similarly, the Respondent purchased and received at its Memphis facility products, goods, and materials valued in excess of \$50,000 directly from points outside the State of Tennessee.

The Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

## II. LABOR ORGANIZATION

United Food and Commercial Workers, Local No. 242, is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE UNFAIR LABOR PRACTICES

## A. Allegations and Issues

On October 21, 1981, employees at the Respondent's Memphis facilities engaged in a work stoppage in violation of the no-strike clause in the collective-bargaining agreement between the Respondent and the Union. J.W. Smith participated in that work stoppage. Smith, the acting union steward, was discharged. Other employees at the facility where Smith worked were issued written warning letters.

Counsel for the General Counsel alleges that Smith was discharged rather than issued a written warning because of Smith's status as union steward and his failure to take affirmative action to halt the strike as was requested of him by the Respondent's representatives.

The Respondent denies that Smith was accorded harsher discipline than was accorded other employees who participated in the work stoppage because of his status as a union steward. Rather, the Respondent alleges that Smith was an instigator and leader of the work stoppage, and that it was for this reason, in addition to Smith's failure as a union steward to take affirmative action to halt the work stoppage that he was discharged.<sup>1</sup>

## B. Background

The Respondent operated a meat processing and packing plant in Memphis, Tennessee, from February 1963 until it closed in June 1982. J. W. Smith worked for Respondent from the time it began operations in February 1963 until discharged on October 21, 1981.

The Respondent began its Memphis operation in a single facility located on Warford Street. In 1979, the Respondent moved several departments to a Chelsea Street annex. Among the departments moved were the beef department, conversion department, and shipping dock. J. W. Smith worked in the conversion department, the primary function of which was to bone pork loins and butts. The conversion department consisted of approximately 70 employees, including Foreman Phillip Reeves, Assistant Supervisor John Payne, 18 individuals working on the butt table, 45 individuals working on the loin line, and 7 individuals working in a salt meat area.

During October 1981, the conversion department was responsible for a Japanese loin contract requiring 80,000 pounds of finished boneless loins per week. These loins were transported from the "cutting floor" at the Warford facility to the conversion department of the Chelsea facility for boning. During the normal workweek, there were times when the conversion area ran out of loins to be bone, and the entire loin line changed to another product, usually butts. This required a 10- to 15-minute

<sup>1</sup> On June 7, 1983, the Respondent filed with the Board a Motion for Summary Judgment requesting that the Board defer to an arbitrator's decision upholding Smith's discharge and dismiss the complaint herein. By Order dated June 10, 1983, the Board denied the Respondent's Motion for Summary Judgment without comment. The Respondent's argument for deferral was not renewed before me and is not addressed in the Respondent's post-trial brief. Accordingly, I find that issue is not before me and do not discuss it further herein.

changeover process during which most of the employees took a short break. During October 1981, J. W. Smith was serving as acting union steward in the conversion department. Smith was substituting for Billy Yates, the elected steward who had been off work sick for approximately 3 months.

On October 20, 1981, there was an incident on the "cutting floor" at the Warford facility, as a result of which employee Johnny "Cowboy" Ward was indefinitely suspended, pending investigation, for walking off the line without permission. On the following day, October 21, the majority of employees of the pork cut department at the Warford facility refused to return to work after the 7:30 a.m. break. At approximately 7:50 a.m. Terry Van Dyke, an industrial engineer at the Warford facility, advised Lynn Iverson, labor relations manager, that the pork cut employees would not return to work. At approximately 8 a.m., Iverson called Union Vice President James Hunt, told Hunt the walkout was illegal, and directed Hunt to tell the employees to return to work. Hunt did so, but advised Iverson that the employees refused to return to work.

#### *C. Events of October 21 at the Chelsea Facility*

On October 21, employees at the Chelsea facility were scheduled to report to work at 8 a.m. On that morning, Smith arrived for work as he normally did at approximately 7:30 a.m. After punching in his timecard, Smith prepared for work and then sat down to drink a cup of coffee in the breakroom. I credit Smith that, before arriving at work that day, he had no knowledge of any problem occurring at the Warford facility. At 8 a.m., Smith and other employees on the loin line began work as usual. After working 5 or 10 minutes, employee Roland Hayes, who worked next to Smith, asked Smith if he had heard about Ward being fired the previous day. Hayes also told employee Willie Golden and other employees at the pork-loin table about the incident and told them that the conversion department was going to walk out if employees at the Warford facility walked out. Smith told Hayes that he had not heard anything about the incident and told them that the conversion department was going to walk out if employees at the Warford facility walked out. Smith told Hayes that he had not heard anything about the incident involving Ward and not to pay attention to the rumor. I credit Smith that this was the first time he heard anything about the incident at the Warford facility involving Ward. Loin line employees continued to bone pork loins for approximately 30 minutes, until they ran out of available loins. Because cutting floor employees at the Warford facility had walked out, there were no loins available at the Chelsea facility for work on the Japanese pork-loin contract.

At approximately 8:30 a.m., about the same time that employees ran out of available loins, Supervisor Reeves received a telephone call from the Warford facility in which he was advised that the cutting floor had walked out. Reeves was instructed to keep employees at the Chelsea facility working and not to say anything to them about the walkout. Reeves then advised Assistant Supervisor Payne about the call he had received and told Payne that since they had run out of available loins, in

order to keep employees working, they would switch the loin line from loins to butts. Reeves told Payne to keep his "eyes open" and to carefully watch the butt table, while he would station himself at a particular point on the loin line. The necessary changeover was then made. Smith and most of the other loin line employees went to the breakroom as they normally did during such changeovers, which lasted approximately 15 minutes.

At approximately 8:10 or 8:15 on that same morning, Reeves sent for a mechanic from the Warford facility to make repairs at the Chelsea facility. The mechanic, Charles Garrison, arrived at the Chelsea facility around 9 a.m. Garrison told Reeves that employees at the Warford facility had walked out. Reeves told Garrison not to say anything about it to employees at the Chelsea facility and just to do his work. Reeves and Payne both testified they saw Garrison in the breakroom, and did not see him again after that. There is no direct evidence, only speculation, whether Garrison mentioned the walkout to any employees at the Chelsea facility while he was there.

The changeover from loins to butts was completed and employees returned from the breakroom to work at approximately 9 a.m. Loin line employees changed job stations when they began to work on butts. Smith moved to the front of the line next to employee Sidney Yates, who operated the dumper and whose job it was to make sure the table was supplied with butts. Smith, Sidney Yates, and Payne all testified that switching to butts this early in the morning was unusual, as the normal practice was to work on loins all morning for the Japanese contract. Yates commented on this fact to Smith. Smith called Foreman Reeves over to his work station and asked Reeves, "What was going on?" because it was strange to be working on butts that early in the day. Reeves advised Smith that there was a problem on the cutting floor at the Warford facility. Reeves, however, did not specify what the problem was, and Smith did not ask. Smith continued working. A few minutes later, an employee in the salt meat area called Smith over to his work station.<sup>2</sup> Smith left his work station and went to the salt meat area to talk to the employee.<sup>3</sup> The employee, Tony Dorsey, told Smith that he had heard a rumor from a mechanic that the Warford facility was on strike. Dorsey asked Smith what was going on. Smith told Dorsey that he did not know what was going on and that he would make some phone calls to try to find out. Smith and Sidney Yates, who I credit, testified that employees in the salt meat area were working when Smith went to that area and continued to work when Smith left

<sup>2</sup> Yates corroborated Smith that someone in the salt meat area called Smith over and Smith went to that area. I credit that testimony.

<sup>3</sup> Smith admitted he did not ask permission before leaving his work station to go to the salt meat area. Smith testified that it was past practice for a steward to leave his work station without permission to talk to an employee with a problem. Reeves testified that it was a practice for stewards to tell him that they were going to talk to an employee. Billy Yates, who had been the elected steward of the conversion department for approximately 5 years, testified that stewards could leave the work line without permission when called over by an employee, that he had done so regularly, and that Reeves knew he had done so, and never reprimanded him. I credit Smith and Yates with regard to the actual practice of stewards leaving their work station without permission and without notifying the foreman when they were called by an employee.

the area. Smith then used the telephone in Reeves' office and called the "bacon area" at the Warford facility to attempt to contact Union Vice President James Hunt. Smith was unable to reach Hunt and returned to his work station.

A short time after returning to his work station, Smith was called by employee Doug Rich, who worked near the loin table. Smith went to Rich. Rich asked Smith what was going on, and Smith replied that he did not know, but was making telephone calls to try to find out. According to Smith, who I credit, Rich was working when Smith went over to him and continued to work when he left. Smith was then called by Nathaniel Perry, who worked directly behind Rich. Perry also asked Smith what was going on. Smith again replied he did not know and was making telephone calls to try to find out. I credit Smith that he told Perry and other employees to keep working while he was making the calls. Perry continued working when Smith left. Smith returned to Reeves' office and telephoned the shipping dock at the Warford facility. Smith asked to speak to one of the union stewards, but was told they were out. Smith testified credibly that when he returned from using the telephone, he observed that some of the men stationed at the end of the line were standing in a group talking to one another. Employees at the front of the table were still working. Reeves approached Smith and told Smith he had better get the men back to work. Smith replied that he needed time to use the telephone in order to find out what was going on at the Warford facility. Smith went to the public telephone in the breakroom several times and attempted to contact James Yates, the elected union steward at home. Smith was unsuccessful and reported back to the employees that he still did not have any information. On the last occasion that Smith was using the telephone in the breakroom, he was interrupted and told that company officials wanted to see him. Smith returned to the work area where he saw Vice President/General Manager Ken Miller and Labor Relations Manager Lynn Iverson. Miller was standing on a platform in front of the assembled employees, and Smith walked over to that area.

Several employees corroborate Smith's testimony that he told employees to continue working while he used the telephone to try to find out what was going on at the Warford facility. Employee Sidney Yates testified credibly that, before Smith left to use the telephone in the breakroom he overheard Smith tell the other employees to keep working until he found out something. Employee Roland Hayes also testified he heard Smith tell employees not to stop work and to stay at their job stations. Employee Willie Golden testified Smith told him and other employees to keep working until he found out something. Golden testified that some employees continued to work and some did not. Employee Ernest Taylor also corroborated Smith. According to Taylor, when Smith attempted to telephone the Warford facility and was unable to reach anyone, Smith returned on occasion to the work area and told employees standing around to go back to work. Hayes, Golden, Taylor, John Taylor, and Sidney Yates all testified that they did not hear or

see Smith say or do anything to any employee to encourage them to stop work or walk out.

I credit Yates that, while Smith was in the breakroom using the telephone, employees started chanting, "Walk out. Walk out." One of the employees said in a loud voice, "We can't stay here and they're out." According to Yates, this chanting started at the other end of the line from where Yates worked and in the opposite direction from where Smith went to use the telephone. During this chanting, some employees continued to work and some stopped. As the chanting increased, more employees stopped work. While this was going on, Smith was still in the breakroom using the telephone. Some of the employees, including Yates, walked out. When they got outside, an employee approached Yates and the others and told them that only the "cutting floor" had walked out at the Warford facility. Yates then said that they had better go back inside and return to work until they found out what was going on. When they went back inside, Reeves told Yates and the other employees that if they were going back to work, do so, and, if they were not, to get off company property. It was then that Iverson and Miller arrived.

Testimony of Supervisor Reeves is directly contradictory to that of Smith and other employee witnesses. Reeves' testimony is corroborated in part by Assistant Supervisor Payne. Reeves testified that at approximately 9:20 a.m. he noticed the vat holding meat was full, and meat on the table was getting low. According to Reeves, he walked over to Smith, who was working next to dumper operator Sidney Yates and said, "What's going on, we've got some kind of problem." Reeves then told Yates to raise the dumper and dump the next vat of meat onto the table. According to Reeves, Yates looked at Smith, but said nothing. Reeves then said, "What are you fixin' to do? Are you fixin' to walk out?" Reeves testified that Smith said, "Yes, we are, they have already walked out at the other plant." Reeves testified he responded that there were no labor problems at the Chelsea facility so there was no reason to walk out. Payne testified he saw Reeves talk to Yates and Smith, but did not hear what was said. According to Reeves, Smith then turned and walked away from his work area. Payne testified that when Smith left his work station, Reeves came over to him and said, "They are going to walk out." Payne later altered his testimony, adding that Reeves told him, "J. W. said they are going to walk out." According to Payne, Reeves told him to call Miller at the Warford facility. Payne immediately went to use the telephone in Reeves' office.

Reeves testified that, when Smith left his work station, Smith went to the saltmeat area, the trim area, and in between the loin and butt lines talking to employees. Reeves and Payne both admit that they could not hear what Smith said to employees, but both testified that the employees immediately stopped working as soon as Smith talked to them.

Testimony regarding the telephone conversation between Payne and Miller is revealing. Payne testified that, when Reeves told him to call Miller, Payne went immediately and called Miller from the telephone in Reeves'

office. According to Payne, this call lasted no longer than 2 minutes. Payne testified that in the call he told Miller, "Kenny, they have stopped working over here." Miller asked if Payne had told employees to go back to work, and Payne replied, "Yes we did but they refused." Miller then told Payne to try again to get the men to return to work and informed Payne that he would come immediately to the Chelsea facility. Miller testified that when Payne called him, Payne said, "They're out at the annex." On cross-examination, Payne testified that while he was on the telephone talking to Miller, employees were still working and that, although loin line employees were out of meat, they were in the plant standing by their work stations. After this call, Payne returned to the work area. Reeves was then at the head of the loin line, confronting employees, including Smith as a group.

Reeves testified he again asked Yates to raise the dumper. Yates walked away. According to Reeves, he then told Smith that this was an illegal work stoppage and directed Smith to tell the employees to return to work. Reeves testified that Smith responded, "I won't do it." Reeves then testified:

I think at that time I told him [Smith] that if he didn't tell the people to go back to work because he was shop steward, then he would be held solely responsible for this wild cat strike, or this illegal work stoppage, was my exact words.

Reeves testified Smith said he was going to use the telephone and proceeded toward the breakroom. According to Reeves, no employees had left the plant as yet. Reeves testified employees were "milling around" and that he "repeated" telling them to go back to work.

Payne's testimony tends to corroborate that of Reeves. According to Payne, Reeves told Smith to ask the employees to go back to work. Smith replied, "I can't do that, I need to talk to someone at the plant." Smith then went to use the breakroom telephone. According to Payne, Smith later returned and said he could not get in touch with anyone. A short time later, Smith went to use the telephone again. Payne testified that while Smith went to use the telephone on these occasions, employees were standing around in groups in various areas of the department.

Testimony of the various witnesses is not substantially different regarding what took place after Miller and Iverson arrived. Reeves testified Miller walked into the plant and told employees to go back to work but that no one responded. Miller asked to see Smith, and someone went to get Smith who was on the telephone. Smith came to the work area. According to Reeves, Miller told Smith if the employees did not go back to work the plant would lose the Japanese loin contract. Every witness agrees that Miller directed Smith to tell the employees to return to work. According to Reeves, Smith replied, "I can't do that." Payne corroborated Reeves that Smith replied he could not do that. Miller told Smith he had 5 minutes to get out of the building if the employees were not going to back to work. Smith then walked back to the breakroom, and employees started walking out. Miller and Iverson then left, and the rest of the employ-

ees, except for three who stayed to clean up, walked out behind them. When asked if Smith left at the same time as the other employees, Reeves responded, "No, I think he went back in the back again . . . He may have been there 5 minutes longer, but he left just like everybody else did."

Miller testified that when he and Iverson arrived at the Chelsea facility, employees were "milling all over" and "there was a lot of noise." Miller stood on a platform addressing Smith who stood with the employees below him. Miller told Smith as the steward that he wanted Smith to get the men back to work. Smith said he could not. Miller told Smith that the plant could lose the Japanese loin contract if Smith did not get the men back to work. According to Miller, he and Iverson waited about 5 minutes and, when employees started walking out, he and Iverson left. Miller provides partial corroboration to the testimony of Sidney Yates, described below, regarding a conversation between Miller and employees at the Chelsea facility. Miller testified that employees asked what was going on at the Warford facility, and that Miller responded that it did not concern the Chelsea facility. Miller testified that he could not recall what Smith did or where Smith went after the conversation between them described above. Miller said he did not see Smith walk out.

Smith testified that after he was summoned from the telephone by Miller, Smith returned to the work area. When he approached Miller, Miller told Smith, "Make these guys go back to work. If you don't, there will never be another pork loin boned in this plant." Smith admits that he did not comply with Miller's instruction to tell the men to go back to work. Smith testified that he responded to Miller that he had already asked the men to keep working. Smith told Miller, "If anybody can make those men go back to work, you can." Smith then asked Miller what the problem was at the Warford facility. Miller replied that whatever was going on did not concern employees at the Chelsea facility. Smith told Miller he wanted to make some telephone calls, and Smith returned to the telephone to again call the Warford facility. Smith was able to contact no one and returned to the work area. Smith observed employees walking out and leaving the plant. Smith testified he then went outside and asked the employees who were leaving to go back to work. They did not do so, and Smith went back inside the plant. Approximately five employees were still inside the plant, and Smith told them to be certain everything was cleaned up before they left. Smith testified he helped other employees clean up and that he and the other men then dressed and left the plant.

Employee Sidney Yates, corroborated by Miller and Smith, testified that during the conversation between Miller and Smith, some employee asked what was going on at the Warford facility. Miller replied that what was going on at the Warford plant did not concern them. Miller told the employees that if they did not go back to work, they would never bone another loin. Yates testified that, during this conversation, Miller told Smith, "Get these men back to work because if you don't get them back to work, it is going to be on your head."

Yates corroborated Smith that Smith told Miller he had already asked the men to return to work, that Miller was the boss, and that Smith could not make them work but that Miller could make them go back to work. Yates testified that after the conversation between Miller and Smith, Yates went to the dressing room, changed clothes, and left the plant along with most of the employees. Yates corroborates Smith that Smith was still inside the plant when he and the other employees left.

Iverson and Miller made the decision to discharge Smith. Though Iverson testified the decision to terminate Smith was made on October 21 or, more probably, October 22, I note that the discharge notice to Smith is dated October 21. Iverson testified that before he and Miller made the decision to discharge Smith, Iverson conducted an investigation regarding the walkout at the Chelsea facility. Iverson admits, however, that he spoke only to Reeves and Payne. When asked if there was anything other than his discussions with Reeves and Payne that he relied on in making his decision to discharge Smith, Iverson replied, "and his actions that day," which Iverson himself witnessed. Asked if this was action he learned of from Reeves and Payne, Iverson replied, "No, I was there." Asked what action he was referring to, Iverson replied, "When he said, 'I can't do that' and he was insubordinate to Mr. Miller." When asked what insubordination he was referring to, Iverson replied, "He didn't tell them to go back to work like Mr. Miller told him to." Iverson was then asked if he relied on that inaction by Smith in making his decision to terminate Smith. Iverson replied, "Just like your boss telling you something to do and you didn't do it." Miller, too, cited as a reason for Smith's discharge his refusal to direct other employees to return to work. Miller testified:

J.W., on my direct order, refused to even turn around and even acknowledge that I had told anything. . . . He was discharged for leading and participating in the strike and insubordination.

#### Analysis and Conclusions

There is no evidence Smith was aware of a planned walkout or the contemplation of a walkout at the Warford facility before Smith arrived at work on the morning of October 21. The Respondent's argument to the contrary is based on pure conjecture and is rejected. Department Supervisor Reeves was notified of the walkout when he received a telephone call from the Warford facility at approximately 8:30 a.m. on October 21. Reeves was told not to say anything to anyone about the walkout. Because loins boned at the Chelsea facility are transported from the cutting floor of the Warford facility, the work stoppage at the Warford facility caused the Chelsea facility to run out of loins. Reeves made the decision to switch from loins to butts in order to keep employees working. During the changeover, most of the loin line employees, including Smith, went to the breakroom from 10 to 15 minutes. The testimony of Smith, Sidney Yates, and Assistant Supervisor Payne shows, contrary to the assertion of Reeves, that switching from butts to loins this early in the work day was unusual. Therefore, I do not find it surprising, as the testimony of Smith, Sidney

Yates, and Reeves shows, that soon after the switch was made to butts, Smith asked Reeves why the switch had been made. Reeves, contrary to instructions from higher management, told Smith there was a problem at the Warford facility. Smith, corroborated by Sidney Yates and other employees, testified credibly that employees in different areas called Smith over to ask him what was going on. I credit Smith that he informed employees he did not know what was going on, that he would make telephone calls to try to find out, and that he instructed employees to keep working. I credit the testimony of Smith, Sidney Yates, and other employees that employees who called Smith over to them continued to work after Smith left their area. Smith, Sidney Yates, Roland Hayes, Willie Golden, Ernest Taylor, and John Taylor all testified that Smith never told employees to stop work or walk out and never did or said anything to encourage employees to do so. I credit this testimony. It is undisputed that Smith made several telephone calls throughout the morning in an attempt to determine what was happening at the Warford facility. The initial walkout of Sidney Yates and some other employees occurred while Smith was not even present, but was in the breakroom using the telephone. Due to rumors, such as that disseminated to employees by Roland Hayes, and the lack of meat which prompted the switch from loins to butts, the initial walkout by Yates and other employees occurred. I was particularly impressed by Sidney Yates' demeanor when he explained what changed his mind and caused him to walk out for good once he had decided to return to work and reentered the plant. Yates, Smith, and even Miller testified that employees asked Miller what was going on at the Warford facility and that Miller told employees it did not concern them. Yates' demeanor was entirely forthright and convincing that his and other employees' reaction to this statement was hostile and that it prompted them to walk out for the last time on the morning of October 21.

The account given by Reeves and Payne of the events on the morning of October 21 contains certain significant inconsistencies and provides an illogical explanation for a spontaneous walkout of employees. The Respondent argues that Smith came to work on the morning of October 21 knowing there was to be a walkout. The Respondent's argument would have one believe that instead of walking out during the break period when the switch was being made from loins to butts and there was no work to do, Smith had the employees wait until just after they began to work on butts before they quit. Reeves alleges that he approached dumper operator Sidney Yates and told Yates to dump the next vat of meat on the table, that Yates looked to Smith as if for a signal, that Reeves asked Smith, "What are you fixin' to do . . . Are you going to walk out?"; and that Smith replied, "Yes." I was not impressed by Reeves' demeanor, and I am convinced that he made this up in order to bolster his other testimony. Reeves, corroborated on this point by Payne, testified that Smith walked from work station to work station talking to employees, and that as he did so they stopped work. I would discredit Reeves on demeanor, while Payne I would not. Payne's testimo-



ny, however, contains certain unsettling inconsistencies. Payne testified that at Reeves' directions, he went to the telephone in Reeves' office and called Miller. According to Miller's version of that call, Payne told Miller that employees had walked out. This suggests corroboration of Sidney Yates' testimony that indeed there was an initial walkout which was aborted. Payne testified that while he was on the telephone to Miller, most employees were still in fact working except for some who had run out of meat and were standing around by their work stations inside the plant. Payne also testified that in the telephone conversation with Miller he told Miller that he had tried to ask the employees to return to work. There is, however, no such testimony to that effect by Payne. Rather, Payne testified that as soon as the work stoppage began, he was directed by Reeves to call Miller and did so. Payne also admitted later that it was not until after the telephone call to Miller that he went over to the area where Reeves was talking to employees and heard Reeves direct Smith to tell the men to return to work. The Respondent's version of how the work stoppage was initiated, propounded by Reeves and Payne, is illogical for yet another reason. Smith admittedly made several telephone calls throughout the morning to attempt to find out what was going on at the Warford facility. The Respondent's version would have one believe that even though he had not been able to find out what was going on because employees had already walked out and Smith was therefore not able to speak to any of the stewards, Smith nevertheless in full view of supervisors circulated around the department directing employees to stop work. Further, that version would have me conclude that from approximately 9:20 or 9:25 a.m., when Smith first left his work station to talk to an employee, until approximately 9:50 a.m., when Miller and Iverson arrived, employees stood idly by inside the plant. I find this version illogical. Rather, I credit the version of Sidney Yates and other employees reflecting that there was a gradual work stoppage resulting from rumors and talk among employees which resulted in them initially walking out while Smith was on the telephone attempting to determine what was happening at the Warford facility. Further, I find that not only did Smith not instigate the initial work stoppage, but also that he played no leadership role in the ultimate walkout of employees that morning. Smith, Sidney Yates, Reeves, and Payne all testified that Smith was not in the work area when Miller and Iverson arrived from the Warford facility, but rather that Smith was called to the work area from the breakroom. It is unequivocally clear that Miller directed Smith to tell the employees to return to work and that Smith refused to do so. Smith, Yates, and Miller all testified that in response to a question about what was going on at the Warford facility, Miller told employees that what was going on did not concern the Chelsea facility employees. As indicated above, I credit Yates that it was this statement which irritated and angered him and other employees and caused them to walk out. It is clear that Smith did not walk out at the same time that other employees left, trailed by Miller and Iverson. Rather, Smith remained in the building for about 5 minutes, and it is undisputed that he helped clean up the work area before

leaving. Smith and a few remaining employees who helped clean up were the last employees from the department to leave.

The Respondent's real reason for discharging Smith is only superficially masked by its claim that Smith actively initiated the work stoppage. This real reason is reflected several different times in this record. Reeves himself testified that when the work stoppage was first beginning he directed Smith to tell the employees to go back to work. Reeves testified that when Smith declined:

I think at that time I told him that *if he didn't tell the people to go back to work because he was shop stewards, then he would be held solely responsible* for this wild cat strike, or this illegal work stoppage, was my exact words. [Emphasis added.]

Sidney Yates testified without contradiction from Miller that when Miller and Iverson came to the Chelsea facility, Miller told Smith in the presence of employees to get the men back to work and that if he did not, "It is going to be on your head." While the words may not be exact, the message is both clear and uncontradicted. Miller in fact testified on cross-examination when asked what Smith did after Miller gave Smith 5 minutes to get the men back to work, "I know one thing he didn't do, was he didn't turn around and tell them to go back to work." Iverson too pointed to the fact that, in his view, Smith was "insubordinate" when he refused a direct order from Miller to tell the employees to return to work. Iverson, when asked if this inaction by Smith was relied on to discharge Smith, testified, "Just like your boss telling you something to do and you didn't do it." I find that this was the real and sole reason for Smith's discharge. An employer is free to discipline particular employees rather than all employees who participate in an unprotected work stoppage provided that the criteria used in selecting employees for discipline is not related to their union activities. In the absence of an express contractual obligation on union officials, the imposition of more severe sanctions on union officials than on other employees for participating in an unlawful work stoppage violates Section 8(a)(3) of the Act. *Metropolitan Edison Co. v. NLRB*, 103 S.Ct. 1467 (1983); *Consolidation Coal Co.*, 263 NLRB 1306 (1982); *Miller Brewing Co.*, 254 NLRB 266 (1981), *enfd.* 686 F.2d 962 (D.C. Cir. 1982); *Precision Castings Co.*, 233 NLRB 183 (1977). Accordingly, I find that the Respondent discharged Smith in violation of Section 8(a)(1) and (3) of the Act.

#### CONCLUSIONS OF LAW

1. The Respondent, John Morrell & Co., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. United Food and Commercial Workers, Local No. 242, is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent discharged Jimmy W. Smith for participating in a walkout on October 21, 1982, solely on the basis of his position as acting union steward, and the Respondent thereby violated Section 8(a)(1) and (3) of the Act.



4. The unfair labor practices which the Respondent has been found to have engaged in, as described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Accordingly, on the foregoing findings of fact and conclusions of law I issue the following recommended<sup>4</sup>

#### ORDER

The Respondent, John Morrell & Co., Memphis, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees who participate in a walkout solely because they hold positions as union stewards.

(b) In any other like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act.

(a) Offer Jimmy W. Smith immediate and full reinstatement to his former position, or, if that position no longer exists, to a substantially equivalent position without prejudice to his seniority and other rights and privileges.<sup>5</sup>

(b) Make whole Jimmy W. Smith for any loss of earnings or benefits he may have suffered by reason of the discrimination against him by payment to him of a sum of money equal to the amount he normally would have earned from the date of said discrimination to the date of the Respondent's offer of reinstatement, less net interim earnings, with backpay to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977); see generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

(c) Expunge from its files any reference to the discharge of Jimmy W. Smith and notify him in writing that this has been done and that evidence of the unlawful discharge will not be used as a basis for future personnel actions against him.

<sup>4</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>5</sup> At the time of the trial herein, the Respondent's Chelsea Street facility was closed. Accordingly, this order contemplates that the Respondent offer Smith reinstatement to his former position if it exists and, if not, then to a substantially equivalent position, if one exists, at another facility operated by the Respondent in Memphis, Tennessee. If such does not exist, the Respondent is directed to offer Smith reinstatement to a substantially equivalent position at another facility pursuant to any transfer rights he may have in accordance with the provisions of the collective-bargaining agreement between the Respondent and the Union.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Chelsea Street and Warford Street facilities located in Memphis, Tennessee, copies of the attached notice marked "Appendix."<sup>6</sup> Copies of said notices, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

<sup>6</sup> It is hereby ordered that in the event the Respondent's Memphis facilities are not in operation, then the attached notice shall be mailed by the Respondent to all employees who were on the Respondent's payroll at those facilities at the time they closed and, in addition, the notice shall be posted at whatever facility Smith is reemployed pursuant to this Order. Further, if this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### APPENDIX

#### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge employees who participate in a walkout solely because they hold positions as union stewards.

WE WILL NOT in any other like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed in Section 7 of the Act.

WE WILL offer Jimmy W. Smith immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges.

WE WILL make whole Jimmy W. Smith for any loss of earnings or benefits he may have suffered by reason of the discrimination against him by paying him a sum of money equal to the amount he normally would have earned from the date of his discharge to the date of the offer of reinstatement, with appropriate interest.

WE WILL expunge from our files any reference to the discharge of Jimmy W. Smith and notify him in writing

that this has been done and that evidence of the unlawful discharge will not be used as a basis for future personnel actions against him.

JOHN MORRELL & Co.